No. 15,145

United States Court of Appeals

For the Ninth Circuit

A. W. HARTWIG and JEFF TINGLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Rehearing

STERLING M. WOOD
Billings, Montana
Attorney for Appellants

United States Court of Appeals

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Petition for Rehearing

The Appellants herein respectfully petition this Honorable Court for a rehearing of the appeal in the above-entitled cause, and in support of the petition represent to the Court as follows:—

That they reserve the position argued heretofore as to each and all of the points of appeal, but in this petition, and the supporting argument, address themselves solely to the decision herein of May 23, 1957, believing that the Court may be convinced thereby that the result announced in its said decision is based upon the application of incorrect legal principles.

Therefore, this petition, and the argument following the same (which argument is submitted as a part of this petition and is as succinct and brief as possible) are devoted to convincing the Court that it has erred in its principal ruling in its said decision, to the effect that the counts pleaded in the amended complaint herein each

state a cause of action, the said Appellants, through their counsel undersigned, believing, in good faith, that none of the counts so pleaded states a cause of action, and that, accordingly, the Appellee is without legal right in the premises.

WHEREFORE, Petitioners respectfully urge that a rehearing may be granted herein and that the mandate of this Court may be stayed pending the disposition of this petition.

STERLING M. WOOD
Attorney for Appellants

STATE OF MONTANA
} ss.
COUNTY OF YELLOWSTONE

Sterling M. Wood, being first duly sworn, on oath certifies and says:—

That he is the attorney for the Appellants in this action; that he makes this certificate in compliance with Rule 23 of the Rules of this Court; that in his judgment the foregoing petition for rehearing is well founded and is not interposed for delay.

STERLING M. WOOD

Subscribed and sworn to before me this 25th day of June, A. D., 1957.

(SEAL)

ELVA KIRKPATRICK
Notary Public for the State of Montana. Residing at Billings, Montana. My Commission expires July 11, 1958.

ARGUMENT

The position of the Appellants upon this petition for rehearing—a position that is taken with utmost respect for this Court and the members thereof who rendered the decision in the case at bar—is that the Court in its opinion herein, filed May 23, 1957, has erred, under controlling authority, in deciding that, in this action brought October 8, 1948, the United States of America then had the legal right to prosecute the same to judgment against the Appellants.

Before submitting arguments and authority to sustain this position of the Appellants, we shall point out herein that the authorities cited by this Court, on page 6 of its printed opinion herein, do not support its conclusion that the savings clause in the Housing and Rent Act of 1947 does not exclude *by implication* the effect in this case of 1 U.S.C.A., Paragraph 109—the general savings statute. Thus, in United States vs. Carter et al., 171 F. 2d, 530 and 532, the Court said:

> "Section 1(a) of the Housing and Rent Act of 1947 repeals Section 53 in part, together with other sections, of the 1946 Act except that it provides that : '* * * any allocations made or committed or priorities granted for the delivery, or any housing materials or faciltiies under any regulation or order issued under the authority contained in said Act, and before the date of enactment of this Act, with respect to veterans of World War II, their immediate families, and others, shall remain in full force and effect.'
>
> "We interpret the foregoing language to be an expression of the intent of Congress to retain in full force and effect all orders, commitments, regulations,

and remedies relating to veterans' housing which had accrued prior to the date of the 1947 Act. At any rate, the foregoing language is the antithesis of the express language that Section 109 requires of a statute in order to repeal pre-existing remedies."

The Court of Appeals for the 5th Circuit, in the Carter case, supra, does not mention the rule of "implication" (which Appellants contend is here involved)—a rule that must be considered and applied in the case at bar under the controlling decision of Great Northern Railway Company vs. United States, 208 U.S. 452, 52 L.Ed. 567. As a matter of fact, the Court in the Carter case misstates the rule of the Great Northern Railway Company case supra—a rule which has been upheld and restated by the Supreme Court of the United States in the case of Hertz vs. Woodman et al., 218 U.S. 205, 54 L.Ed. 1001. The following is quoted from the Hertz case for the convenience of this Court, viz:

"The repealing Act here involved includes a saving clause, and if it necessarily, *or by clear implication,* conflicts with the general rule declared in Section 13, the latest expression of the legislative will must prevail ****. The significance of Section 13 is therefore this: That if, prior to the repealing act, the defendants in error were under any liability or obligation **** that obligation or liability was not relieved by the mere repeal of that section, nor as a consequence of the saving clause in the repealing act, unless the special character of that clause, *by plain implication,* cuts down the scope and operation of the general rule in Section 13."

The next case cited by this Court is that of Pruitt vs. Litman, 89 F. Supp. 705. There the Pennsylvania Court

refers to the savings clause in the Housing and Rent Act of 1947 and merely says that it is not "so plainly in conflict with the general rule of statutory construction established by Title 1 U.S.C.A., Paragraph 109, as to make that Section 109 inapplicable." The doctrine of "implication" is not even mentioned, and, as a matter of fact, the court leaves the impression—contrary to the law, supra—that a repealing Congressional act must "expressly provide" for a repeal in order to effect a repeal.

The next case cited by this Court on page 6 of its printed opinion herein is that of United States vs. Tyler Corporation, 90 F.Supp. 395. There the United States District Court in Virginia does no more than rule, and flatly—without argument, or the citation of any authority, or a discussion of the doctrine of "implication"—that the action involved, for claims under the Veterans' Housing Act of 1946, was maintainable, after the expiration of that Act, by virtue of the Federal general savings statute.

The next case cited by this Court, on the page mentioned of its printed opinion, is that of Rheinberger vs. Reiling, 89 F.Supp. 598. Here, again, there is not a word in the decision, by way of argument or citation of authority, on the doctrine of "implication," and the Minnesota Federal Court rendering the decision has wholly disregarded the law that, by implication alone, a repealing act can take a case out of, or overcome, the effect of 1 U.S.C.A., Paragraph 109.

The next citation by this Court, on the aforesaid page

of its printed opinion, is hardly an authority, consisting, as it does, of a mere footnote by an undisclosed editor. But, after all, this editor predicates his stated conclusion on the Carter case, supra, which, as set forth above, stands discredited as an authority in the case at bar.

Thus, the decisions above mentioned, which this Court has cited and relied upon, do not sustain its decision herein.

A fairly recent case—decided in 1956—and which has not been questioned in any later decision we have found, sets forth clearly, with supporting authorities that are controlling, some of the principles upon which the Appellants rely to fully justify this petition for rehearing. Consequently, in the effort to be succinct, and helpful to this Court, without taking the time, on this petition for rehearing, to make extended research, but, nevertheless, pointing out controlling authority that is applicable herein, we shall now quote from the case referred to, which is that of Territory of Alaska vs. American Can Co., et al., 137 F.Supp., 181. Thus:—

> "It is a fundamental rule of statutory construction that a general saving clause or statute preserves rights and liabilities which have accrued under the act repealed and that they operate to make applicable in designated situations the law as it existed before the repeal, *unless such application is negatived by the express terms or clear implication of a particular repealing act,* or where not otherwise provided by the repealing act. And, where there are express savings clauses in repealing statutes which are later in time, constituting the express will of the Legislature, such have been taken as an indication of legislative intent

to save nothing else from the repeal, and the general saving statute in force in the state does not apply. 82 C.J.S., Statutes, Par. 440, p. 1014; 50 Am. Jur., Statutes, 534-5, Secs. 527-528; Great Northern Ry. Co. v. United States, 208 U.S. 452, 28 S.Ct. 313, 52 L.Ed. 567; Wilmington Trust Co. v. United States, D.C., 8 F. 2d 205; United States v. Chicago, St. P., M. & O. Ry. Co., D.C., 151 F. 84; United States v. Standard Oil Co., D.C., 148 F. 719.

"In the Wilmington Trust Co. case (28 F.2d 207) the District Court of Deleware held that repeal of parts of the Revenue Act of 1918, 40 Stat. 1057, by the Revenue Act of 1921, 42 Stat. 227, which provided that the parts repealed shall remain in force as to "the assessment and collection of all taxes which have accrued" under the previous act, left all of the estate tax provisions of the former statute except those expressly saved by the act 'as completely obliterated and extinguished * * * as if the repeal had been absolute and unqualified', since the saving clause kept alive the repealed parts of the earlier act for collection of only those taxes 'accrued' under the earlier act, and saves to the government only such previously accrued taxes. In this case the general Federal savings clause, R.S. Sec. 13, 1 U.S.C.A., Sec. 29, was relied upon to show that the liability of the tax was not destroyed by the repeal of the statute. Upon this point the opinion states:

" 'Of this statute the court, in Great Northern Railroad Co. v. United States, 208 U.S. 452, 28 S. Ct. 313, 52 L.Ed. 567, said: As it "has only the force of a statute, its provisions cannot justify a disregard of the will of Congress *as manifested, either expressly or by necessary implication,* in a subsequent enactment." As the estate tax provisions of the Revenue Act of 1918 were expressly repealed, with specified exceptions, it must be assumed that the exceptions specified constituted a denial of others. To enlarge the exceptions by adding the provisions of Section 13 of the Revised Statutes thereto, or, more accurately stated, to add to

the saving clause of the repealing statute the provisions of R.S. Sec. 13, which, as I understand it, is in implied, if not direct, conflict with the first sentence of the saving clause of the repealing act, would, I think, be a plain disregard of the will of Congress as manifested in the repealing act.' * * * *

"There is another fundamental rule of statutory construction which must be considered in this connection, and that is the rule of 'expressio unius est exclusio alterius'—the mention of one is the exclusion of others —which requires a holding that the Legislature intended to save the taxes specifically mentioned in the repealing act and to exclude all others. Sutherland on Statutory Construction, 3rd Ed. Vol. 2, p. 412, Sec. 4915; p. 416, Sec. 4916; Jones v. H. D. & J. K. Crosswell, Inc., 4 Cir., 60 F.2d 827; Rybolt v. Jarrett, 4 Cir., 112 F.2d 642; Territory ex rel. Sulzer v. Canvassing Board, 5 Alaska 602, at page 622.

"A decision of the Supreme Court of Kansas in the case of State v. Showers, 34 Kan. 69, 8 P. 474, 476, is especially in point, as it relates to a state saving clause as distinguished from the Federal saving clause. In that case the Court was considering the effect of a general saving statute identical with the Alaska statute, as against a later specific savings proviso contained in a repealing act. The opinion of the Court states as follows:

" 'The question as to what should be repealed and what saved was before the legislature. They had the entire subject-matter thereof under consideration, and evidently intended to cover the entire ground; and evidently intended that nothing should be repealed except what they expressly repealed, and that nothing should be saved except what they expressly stated should be saved. They expressly saved some things; therefore it must be inferred that they intended to save no others. *Expressio unius est exclusio alterius.*'

"The opinion also points out that if the special saving clause in the repealing act was not intended to

> cover the entire ground and to substitute for the general savings statute, then it 'has no office to perform,' for the general saving clause would save all that it saves and very much more."

In connection with the foregoing, and also with respect to subsequent argument herein, it must be borne in mind, as the Supreme Court of the United States has held in United States of America vs. Harold T. Lindsay et al., 346 U.S. 568, 98 L.Ed. 300, that:—

> "Congress has unquestioned power to bar recovery on claims of the Federal Government if it sees fit."

Based upon these settled rules, laid down by controlling authority, Appellants contend primarily that it appears, *by necessary implication,* from the language of the Housing and Rent Act of 1947, *taken as a whole,* that this repealing act has the effect to release and extinguish the claimed liability under the Veterans' Emergency Housing Act of 1946, which the Appellee relies upon, and that, accordingly, its amended complaint herein does not state a cause of action in any of the counts pleaded. It should be noted that in Conn vs. Board of Commissioners (Ind.) 51 N.E. 1062 and 1064, the court lays down the well established rule that the *implication or inference* which may arise in the construction of statutes is something not expressly declared but *arises out of* that which is directly or expressly declared in the statute.

Thus, this Court has not supported, with any authority, its stated conclusion on page 6 of the printed opinion herein—that the saving clause in the 1947 Act does not *exclude by implication* the effect of the Federal general

saving statute.

Further, it is fundamental and settled law that all parts, divisions or sections of a statute must be read, considered, and construed together, in construing and applying the statute, and that each must be considered with respect to, or in the light of, all the other provisions or sections and construed in connection, or harmony, with the whole.

82 C.J.S., Statutes, page 694, et seq.

80 Am. Jur., Statutes, paragraph 358.

And in D. Ginsberg & Sons vs. Joseph Popkin, 285 U. S. 204, 76 L.Ed. 704, the Supreme Court of the United States says it is a "cardinal rule" that effect shall be given to every clause and part of a statute.

And in State of California vs. Deseret Water, Oil and Irrigation Co., 243 U.S. 415, 61 L.Ed. 821, the Court says:—

> "The proviso * * * * is an important part of it (the statute to be construed) and, according to a familiar rule, must be given some effect."

Thus, the proviso in the 1947 Act is all important and must be considered carefully in determining whether "by necessary implication" it has the "effect" of extinguishing the liabilities claimed by the Appellee herein. Hence we point out, first of all, that without this proviso clause in the Act, then, under 1 U.S.C.A. 109, *all liabilities* created by the Veterans' Emergency Housing Act of 1946, existing at the time of the 1947 repealing Act, would remain in force, including the items of liability covered

by the terms of the said proviso. But Congress intended *something* by the enactment of that proviso. It—the proviso—"must be given some effect." The only sensible conclusion possible is that Congress intended by the 1947 Act and implied by the proviso therein, that, subsequent to June 30, 1947, when the Housing and Rent Act was enacted, no liabilities would be enforcible under the 1946 Act that were not comprehended by the terms of the proviso in the 1947 Act. It cannot be argued, legally, that the proviso is without effect or that Congress did a nonsensical thing in placing it in the 1947 Act. Thus, giving effect to that proviso, as drawn, and as added to the 1947 Act, the plain implication thereof by Congress is that liabilities shall remain in effect in connection with "allocations made or committed, or priorities granted," etc., before the date of the enactment of the Act of June 30, 1947 (as declared in the proviso) but that in other respects the savings statute should be without effect. Hence, there is a legal basis for contending, as the Appellants do, that 1 U.S.C.A. 109 has no application whatever in the case at bar, and that the claimed liabilities made the basis of the action at bar were extinguished by the said 1947 Act and were not in force or effect when this action was brought. To contend to the contrary would, contrary to law, nullify the proviso.

But apart from the intent of Congress, and the plain *implications* of the proviso in question, it is important to consider the effect of the 1947 statute (the Housing and Rent Act of that year) upon Priorities Regulation No.

33, and the legal importance of the Regulation as a basis for the action at bar. The Supreme Court of the United States has decided in United States of America vs. Robert Fortier et al. 342 U.S. 160, 96 L.Ed. 179, that *statutory authority* for Priorities Regulation No. 33 was repealed by the Housing and Rent Act of 1947, *except only as otherwise provided in the proviso of the Act,* which proviso, by its plain terms, does not relate at all to any of the matters in suit here.

It is also important to note the ruling of the United States Court of Appeals of the 7th Circuit in the Sedivy case (188 F.2nd, 729) which this Court has mentioned on page 6 of its printed opinion, and which ruling is not dictum. Paragraph 5 of the syllabus of that case reads as follows:

> "Priorities Regulation 33 providing that no person may sell any dwelling built under regulation to Veterans for more than approved maximum sales price, was repealed by the Housing and Rent Act of 1947."

Therefore, the further contention of the Appellants herein is that there was no basis in law, when the action at bar was brought, for claiming that the alleged liabilities, made the basis of the amended complaint in this action, did then exist, in that the Veterans Emergency Housing Act of 1946 does not, *alone, in terms or otherwise,* create the liabilities sued upon in the case at bar. In order to establish those liabilities the Government must stand (as it is doing in its pleading herein) not only

on the Veterans' Emergency Housing Act of 1946 but also, and primarily, on Priorities Regulation No. 33. That Regulation (authorized by the 1946 Act) alone sets forth the provisions that create the alleged liabilities herein, made the basis of suit. The said 1946 Act and the Regulation are submitted to the Court, without quotations therefrom, to speak for themselves in this connection and to establish the foregoing as a correct statement of fact and of the law. Thus, since Priorities Regulation No. 33 was repealed and nullified by the enactment of the Housing and Rent Act of 1947, and then ceased to exist, it follows that there is no basis, in law, for the claims pleaded in 1948 by the Government in the action at bar; and this Court has plainly erred in its rulings in that connection herein. This conclusion is confirmed by the further fact that 1 U.S.C.A. 109, *relates only to statutes, and not to regulations issued under a statute;* and there is nothing whatever in any act of Congress providing that a regulation, or liabilities created thereby, shall remain in effect after the regulation has been repealed and nullified by Act of Congress.

One further claim of error in the Court's opinion herein will be made briefly.

Assuming, *for the sake of argument only,* that Priorities Regulation 33 is effective herein, then, we submit, the Court erred in holding that Section 944.54(e) thereof requires *written* approval for changes in plans from those specified in the original application. This portion of the said regulation reads as follows:—

> "Construction of a project. A builder who uses the HH rating to get materials for housing accommodations must construct them in accordance with the description given in the application, except where he has obtained from the Federal Housing Administration approval for a change from the application."

Furthermore, the Supreme Court of the United States in Belcher et al. vs. Linn, 24 How. 508, 16 L.Ed. 754, said:

> "When power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confined to his or their discretion, the acts so done are, in general, binding and valid as to the subject matter."

Thus, Exhibit 20 herein, a "Compliance Inspection Report," in which the public officers in charge certified, "Building Improvements Acceptably Completed" and "Closing papers may be submitted," is binding and valid; and this Court erred in holding otherwise.

Respectfully submitted.

STERLING M. WOOD

Attorney for Appellants